IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUDOLPH JEFFER DAVIS, Petitioner, v. THE BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICE, Respondent.	: : : : : : :	CIVIL ACTION NO. 03-4398

Memorandum and Order

YOHN, J. November ___, 2004

Petitioner Rudolph Jeffer Davis, a native and citizen of St. Vincent, originally filed a petition for writ of habeas corpus in this court on July 29, 2003, after the Board of Immigration Appeals ("Board") affirmed and adopted an immigration judge's ("IJ") ruling that petitioner was deportable for having been convicted of an "aggravated felony," possession of a controlled substance with intent to deliver, in Philadelphia on July 3, 1997. After oral argument and an evidentiary hearing, this court denied the petition on March 4, 2004, finding that petitioner was indeed deportable for having committed an "aggravated felony" under the immigration laws. On April 19, petitioner filed a notice of appeal.

Currently pending before the court, however, is petitioner's motion for relief from judgment, pursuant to Fed. R. Civ. P. 60(b). In support of his motion, petitioner argues that: (1) he is entitled to relief from judgment pursuant to Rule 60(b)(1), because this court made a "mistake" of law in finding that petitioner was convicted of a Pennsylvania felony; (2) he is

entitled to relief from judgment pursuant to Rule 60(b)(2), because he has produced "newly discovered evidence" establishing that he was in fact convicted of only a Pennsylvania misdemeanor; and (3) he is entitled to relief from judgment pursuant to Rule 60(b)(3), because respondent's failure to produce this "newly discovered evidence" constituted "fraud" and "misrepresentation" on its part.

For the reasons explained below, I will deny petitioner's motion.

FACTUAL & LEGAL BACKGROUND

Petitioner, a native and citizen of St. Vincent, was admitted to the United States at New York City on August 30, 1982, as a P-22 immigrant with lawful permanent resident status. INS Notice to Appear. On July 3, 1997, petitioner was convicted on drug charges in the Philadelphia County Court of Common Pleas, Municipal Court Division. *Id.* Exactly what petitioner was convicted of was one of the issues in his case, as the criminal transcript was unclear as to this point. Amend. Hab. Pet. at 5-6; Mun. Ct. Crim. Transcript.

Under federal immigration law, "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). Thus, "[w]hether an alien has been convicted of an 'aggravated felony' determines whether he is eligible for cancellation of removal." *Gerbier v. Holmes*, 280 F.3d 297, 298 (3d Cir. 2002); 8 U.S.C. § 1229b(a)(3). An "aggravated felony" is defined as "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)." 8 U.S.C. § 1101(a)(43)(B). The Third Circuit has determined that the proper interpretation of 18 U.S.C. § 924(c) leads to the conclusion that to constitute an "aggravated felony," a state drug conviction must: (1) be categorized as a felony under state law and contain a "trafficking

component" (known as a "Route A" aggravated felony); or (2) be punishable as a felony under federal law, regardless of the state categorization (known as a "Route B" aggravated felony). *Gerbier*, 280 F.3d at 299. Thus, if petitioner's Philadelphia conviction were for possession with intent to deliver, the trafficking element would be present, petitioner would have been convicted of a Route A "aggravated felony," and he would not be eligible for cancellation of removal. However, if petitioner were convicted of only misdemeanor possession, he would be eligible for cancellation.

Petitioner was charged with felony possession with intent to deliver under 35 P.S. § 780-113(a)(30), misdemeanor possession under 35 P.S. § 780-113(a)(31), and felony conspiracy. Mun. Ct. Crim. Transcript. The conspiracy charge was dropped (noted by handwriting on the criminal transcript), but the other two charges remained on the transcript. *Id.* Petitioner never appealed his conviction.

In any event, on August 23, 1999, the United States Immigration and Naturalization Service (respondent's predecessor agency) issued to petitioner a Notice to Appear, charging that petitioner's drug conviction qualified as an "aggravated felony" under 8 U.S.C. § 1227(a)(2)(A)(iii), thus rendering petitioner deportable. INS Notice to Appear. In a June 23, 2000 oral decision, an IJ found petitioner to be deportable. Oral Decision. Petitioner appealed this decision to the Board, but the Board affirmed and adopted the IJ's ruling by order without opinion on December 4, 2002. Board Order.

PROCEDURAL BACKGROUND

Petitioner originally filed his petition for writ of habeas corpus in this court on July 29, 2003, and respondent filed its response on August 29, 2003. On September 26, 2003, petitioner

filed an amended habeas petition. Oral argument was held in this court on October 1, 2003, and an evidentiary hearing was held on January 28, 2004. On March 4, finding that petitioner was convicted of possession of a controlled substance with intent to deliver under 35 P.S. § 780-113(a)(30), finding that crime to qualify as an "aggravated felony" under 8 U.S.C. 1227(a)(2)(A)(iii), and thus finding that petitioner was not eligible for cancellation of removal, this court issued an order denying the habeas petition and vacating a previous order staying petitioner's deportation.

Petitioner filed a notice of appeal to the Third Circuit on April 19, 2004, but on May 18, he filed the pending motion for relief from judgment, pursuant to Rule 60(b). Respondent has filed an opposition to petitioner's motion, and petitioner has filed a response to that opposition.

STANDARD OF REVIEW

While the determination to grant or deny relief is within the sound discretion of the court, relief under Rule 60(b) "is available only in cases evidencing extraordinary circumstances." *Lasky v. Continental Products Corp.*, 804 F.2d 250, 256 (3d Cir. 1986) (quoting *Stradley v. Cortez*, 518 F.2d 488, 493 (3d Cir. 1975)). "Thus a party seeking such relief must bear a heavy burden of showing . . . that, absent such relief an 'extreme' and 'unexpected' hardship will result." *Mayberry v. Maroney*, 558 F.2d 1159, 1163 (3d Cir. 1977) (citing *U.S. v. Swift & Co.*, 286 U.S. 106, 119 (1932)).

DISCUSSION

Petitioner argues that: (1) he is entitled to relief from judgment pursuant to Rule 60(b)(1), because this court made a "mistake" of law with regard to the Pennsylvania controlled substance laws and the characterization of crimes; (2) he is entitled to relief from judgment pursuant to

Rule 60(b)(2) because of "newly discovered evidence" he has submitted to the court; and (3) he is entitled to relief from judgment pursuant to Rule 60(b)(3) because of the respondent's alleged "fraud and misrepresentation" in withholding this "newly discovered evidence." I will deal with each of these arguments in turn.

I. Petitioner's Rule 60(b)(1) Argument

Petitioner contends that relief from judgment should be granted to him because of this court's alleged mistake of law in finding that petitioner was convicted of felony possession with intent to deliver. Petitioner argues that his crime could not have been a felony because he was found to have been in possession of only 19 grams of marijuana, and because he was sentenced to less than one year of imprisonment. Pet. Mot. at 5-6. Thus, petitioner makes a legal argument that under the Pennsylvania drug laws and the Pennsylvania sentencing guidelines, his conviction could only have been for a misdemeanor. *Id.*

Rule 60(b)(1) allows relief from judgment for "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). However, the Third Circuit has made clear that a request for reconsideration of a decision on legal issues may not be transformed into a claim that there is a "mistake" under Rule 60(b)(1). *Smith v. Evans*, 853 F.2d 155, 158 (3d Cir. 1988) (finding that "a Rule 60(b) motion may not be used as a substitute for appeal, and that legal error, without more, cannot justify granting a Rule 60(b) motion").

This court is aware that the Third Circuit has explicitly stated that it has yet to decide the issue of whether legal error may be characterized as a "mistake" within the meaning of Rule 60(b)(1). *Page v. Schweiker*, 786 F.2d 150, 155 (3d Cir. 1986). However, the *Page* court did state that "under well-established principles, Rule 60(b) is not a substitute for appeals," and that

"[w]ere the rule otherwise, the time limitations on appeal set by Fed. R. App. P. 4(a), and on motions to alter or amend judgments under Fed. R. Civ. P. 59(e), would be vitiated." *Id.* at 154.

In *Smith*, the Third Circuit dealt with the time limitation issue and Rules 59 and 60. In that case, the appellant filed a motion in the district court under Rule 59(e) after that court dismissed his § 1983 complaint on purely legal grounds.[1] *Smith*, 853 F.2d at 156-57. The appellant's motion "allege[d] no more than legal error and merely reiterate[d] the arguments contained in the complaint." *Id.* at 159. However, the district court judgment was issued on April 23, 1987, and the appellant did not file his motion until May 13. *Id.* Thus, the appellant's motion was untimely, because Rule 59(e) clearly states that such motions must be filed no later than ten days after the judgment. *Id.* at 156. The Third Circuit found that the appellant's motion could not be construed as one under Rule 60(b), and thus the appellant could not take advantage of the one year time limit for motions under that rule. *Id.* at 158-59.

The present case is not unlike *Smith*. Petitioner here failed to file a Rule 59 motion within ten days of the date of the judgment, and thus, under *Smith*, he has lost his opportunity to have legal issues reconsidered. Therefore, this court finds that petitioner is barred from moving for relief from judgment under Rule 60(b)(1) on the basis of an alleged "mistake of law" by this court. Just as in *Smith*, petitioner will not be allowed to avoid Rule 59's ten-day time limit by making a mistake of law argument in a Rule 60(b)(1) motion, especially when petitioner can have his legal arguments considered in the appeal he has pending.

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[1] Rule 59(e) allows for motions to alter or amend judgments and provides, "Any motion to alter or amend a judgment shall be filed no later than 10 days after the entry of the judgment." Fed. R. Civ. P. 59(e).

However, even if petitioner's motion were proper, his arguments regarding the Pennsylvania drug laws and sentencing guidelines would be unsuccessful. Petitioner claims that to be convicted of possession with intent to deliver a controlled substance, there must have been at least one pound of marijuana involved in the transaction for it to be considered a felony. He bases this argument on what appears to be a copy of a portion of the Pennsylvania Sentencing Guidelines. However, a review of those guidelines shows that all violations of 35 P.S. § 780-113(a)(30) are felonies and that the distinctions as to weight are made with reference to establishing the appropriate guideline sentence, not the categorization of the offense by the legislature as a felony.

Petitioner also contends that under 18 P.S. § 7508, if he were found guilty of violating 35 P.S. § 780-113(a)(30), he would have to be sentenced to at least one year of imprisonment. However, the one year mandatory minimum sentence applies to possession with intent to deliver more than two pounds but less than ten pounds of marijuana. Because petitioner's offense obviously involved less than one pound of marijuana (19 grams), the mandatory minimum sentence did not apply.

Finally, petitioner relies on *Wilson v. Ashcroft*, 350 F.3d 377 (3d Cir. 2003). In that case, the petitioner's removal was based on his New Jersey state conviction for possession of marijuana with intent to distribute. *Id.* at 379. The petitioner in that case had pled guilty to "possession with intent to distribute" more than one ounce (28 grams) of marijuana. *Id.* In the course of its opinion, the Third Circuit announced that "[o]nce we determine that the state criminal statute fits the legal definition of aggravated felony, a review of an alien's deportability comes to an end." *Id.* at 381 (citing *Drakes v. Zimski*, 240 F.3d 246 (3d Cir. 2001)).

The court also laid out the Third Circuit's categorization of "aggravated felonies." As stated above, "Route A" aggravated felonies are those state crimes categorized as felonies under state law that involve drug "trafficking." *Wilson*, 350 F.3d at 381. "Route B" aggravated felonies are those state crimes that, regardless of categorization, would be punishable as felonies under analogous federal statutes. *Id.* The district court had found that the New Jersey offense was an aggravated felony using the Route B approach. *Id.* However, after reviewing the petitioner's case, the Third Circuit found that his New Jersey conviction could not be analogized to a hypothetical federal felony under the Route B approach, because the statutes that it was trying to analogize contained different elements. *Id.* at 381-82. The court went on to note, however, that the petitioner may have been guilty of an aggravated felony under the Route A approach but declined to consider that issue, because the district court had not considered it. *Id.* at 382.

Thus, *Wilson* is not of any help to petitioner here because this court has already found that he is an aggravated felon under the Route A approach, and thus *Wilson* is inapplicable.

II. Petitioner's Rule 60(b)(2) Argument

Petitioner contends that he is entitled to relief from judgment under Rule 60(b)(2) because of "newly discovered evidence" that he has submitted to the court – evidence, he argues, that shows that he was convicted of only a Pennsylvania misdemeanor, and not a felony. Pet. Mot. at 4-5. Therefore, petitioner argues, he could not have committed an "aggravated felony" under 8 U.S.C. § 1227(a)(2)(A)(iii), and he is eligible for cancellation of removal. The evidence petitioner has submitted is a cost sheet from the Clerk of Quarter Sessions of Philadelphia in connection with his criminal case, which shows that he was assessed costs in the amount of $35.50, the payment for a misdemeanor, instead of $42, the payment for a felony. Clerk of

Quarter Sessions Cost Sheet. In addition, the document shows that he was assessed $50 in fees, the payment for a misdemeanor, and not $100, the payment for a felony. *Id.*

Rule 60(b)(2) allows relief from judgment for "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2). If the new evidence offered under Rule 60(b) will not alter the court's judgment, the motion may be denied. *See, e.g.*, *Bohus v. Beloff*, 950 F.2d 919, 930 (3d Cir. 1991) (noting that a court should grant a motion under Rule 60(b)(2) "if such evidence is (1) material and not merely cumulative, (2) could not have been discovered prior to [judgment] through the exercise of reasonable diligence, and (3) would probably have changed the outcome"); *Dempsey v. Associated Aviation Underwriters*, 147 F.R.D. 88, 90 (E.D. Pa. 1993) (quoting the above from *Bohus*).

Petitioner's motion under Rule 60(b)(2) will be denied for two reasons. First, this new evidence offered by petitioner does not alter the court's judgment as to the nature of petitioner's conviction in Philadelphia, and thus it will not change the outcome of the case. Although the document does purport to assess the fees and costs for a misdemeanor, it contains conflicting information because it indicates at the top that the charge against petitioner was "MFG/DEL/POSS W/I MID CS," a felony. Clerk of Quarter Sessions Cost Sheet. Moreover, the document was filed by a court clerk on behalf of the Clerk of Quarter Sessions. *Id.* In sum, the court interprets the document, with its conflicting messages, as not being persuasive in either direction, so that it does not cause the court to alter its original finding that defendant was convicted of possession with intent to deliver under 35 P.S. § 780-113(a)(30).

The other reason this court will deny petitioner's Rule 60(b)(2) motion is that this "newly discovered evidence" could have been discovered prior to the judgment in the habeas proceedings through the exercise of reasonable diligence. Petitioner acknowledges that he contacted the Municipal Court of Philadelphia on March 15, 2004 seeking additional information which resulted in his obtaining this document. Pet. Mot. at 2. This was twelve days after the court had ruled on his petition, and after the court held oral argument on the petition, granted the petitioner additional time to file a brief in support of his petition, held an evidentiary hearing on the petition, and granted additional time to discover further records which were referred to during the evidentiary hearing. At no time prior to the filing of this motion did the petitioner ever request additional time to obtain this particular record from the Philadelphia Municipal Court, and there is no indication that he could not have obtained this document months or even years earlier. Thus, it is clear that petitioner has not shown due diligence in discovering the evidence which was readily available to him prior to the evidentiary hearing, and it is also clear that petitioner's case does not evidence the "extraordinary circumstances" required for a grant of relief from judgment under Rule 60(b). *Lasky*, 804 F.2d at 256.

III. Petitioner's Rule 60(b)(3) Argument

Petitioner contends that he is entitled to relief from judgment under Rule 60(b)(3), because he alleges that the respondent "failed to disclose material information . . . which showed Petitioner was ordered to pay misdemeanor fees," and that this failure on the part of respondent amounts to "fraud" and "misrepresentation" under the rule. Rule 60(b)(3) provides for relief from judgment for the reason of "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." Fed. R. Civ. P. 60(b)(3). "To

prevail, the movant must establish that the adverse party engaged in fraud or other misconduct, and that this conduct prevented the moving party from fully and fairly presenting his case. Failure to disclose or produce evidence requested in discovery can constitute Rule 60(b)(3) misconduct." *Stridiron v. Stridiron*, 698 F.2d 204, 207 (3d Cir. 1983).

Petitioner does not set forth any factual basis for fraud by respondent. Rather, the records of the Municipal Court of Philadelphia were available to both parties, and it was, in fact, petitioner's counsel who sought those records. Petitioner had a full and fair opportunity to present his case. Moreover, Rule 60(b)(3) provides that relief from judgment can be granted only if there is fraud "of an adverse party." The record was in the custody and control of the Municipal Court of Philadelphia. It was not in the custody and control of respondent. Thus, even if there were fraud here (of which there is no evidence), respondent could not have "withheld" this document, because it was not in its possession.

CONCLUSION

Petitioner's Rule 60(b)(1) motion is denied because the Third Circuit has made clear that a request for reconsideration of a decision on legal issues may not be transformed into a claim that there is a "mistake" under Rule 60(b)(1). Petitioner's Rule 60(b)(2) motion is denied because: (1) his "newly discovered evidence" is not persuasive enough to alter this court's judgment that petitioner was convicted in Philadelphia for the felony offense of possession with intent to deliver under 35 P.S. § 780-113(a)(30); and (2) petitioner did not show "due diligence" in obtaining this "newly discovered evidence." Finally, petitioner's Rule 60(b)(3) motion is denied because there is no evidence of fraud on the part of respondent, and, even if there were, the evidence that was allegedly withheld was never in its custody or control.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUDOLPH JEFFER DAVIS, Petitioner,	:	CIVIL ACTION
v.	:	NO. 03-4398
THE BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICE, Respondent.	:	

Order

And now, this _____ day of November 2004, upon careful consideration of petitioner's motion for relief from judgment under Fed. R. Civ. P. 60(b), respondent's opposition thereto, and petitioner's response to respondent's opposition, it is hereby ORDERED that the motion is DENIED.

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William H. Yohn, Jr., Judge